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NO.____

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IN THE

Supreme Court Of The United States

October Term, 1995

ORIX CREDIT ALLIANCE, INC.,
Petitioner,

v.

DELTA RESOURCES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 506(b) of the Bankruptcy Code recognizes a right to postpetition interest. The question presented is the following:

Are bankruptcy courts precluded, as a matter of law, from entering an order for the payment of postpetition interest as a part of the "adequate protection" of an oversecured creditor's "interest in property"?

INFORMATION REQUIRED BY RULE 29.6

Petitioner, ORIX Credit Alliance, Inc., is a corporation incorporated under the laws of the State of New York, and its principal place of business is located in Secaucus, New Jersey. Petitioner's ultimate parent company is the ORIX Corporation, a corporation publicly traded in the Republic of Japan. Petitioner does not have any nonwholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

ORIX Credit Alliance, Inc. (ORIX), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 54 F.3d 722 and is reproduced in the appendix at pages 1-18. The opinion of the district court is not officially reported and is reproduced in the appendix at pages 21-26. The order of the bankruptcy court is not officially reported and is reproduced in the appendix at pages 29-32.

JURISDICTION

The court of appeals entered its judgment on June 14, 1995. App. 19-20. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this case are Sections 361, 362(d)(1) and 506(b) of the Bankruptcy Reform Act of 1978, as amended, which is codified at 11 U.S.C. § 101 *et seq.* Section 361 provides as follows:

11 U.S.C. § 361. Adequate Protection

> When adequate protection is required under Sections 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by —
>
> (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under Sections 362 of this title, use, sale, or lease under Section 363 of this title, or any grant of a lien under Section 364 of this title results in a decrease in the value of such entity's interest in such property;
>
> (2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or
>
> (3) granting such other relief, other than entitling such entity to compensation allowable under Section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

Section 362(d)(1) provides, in part, as follows:

11 U.S.C. § 362. Automatic Stay

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay —
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

Section 506(b) provides as follows:

11 U.S.C. § 506. Determination of Secured Status

> (b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

STATEMENT OF THE CASE

Petitioner, a creditor holding a valid lien on collateral with a value in excess of the amount of the debt, filed a motion for relief from stay in respondent's bankruptcy case. The bankruptcy court ordered monthly adequate protection payments measured solely by the straight-line depreciation of petitioner's collateral; the district court reversed and ordered that the bankruptcy court award monthly adequate protection payments that include accrued interest; the court of appeals reversed the district court's order. All three courts agree that an oversecured creditor such as petitioner has a statutory right to postpetition interest; the courts differ as to when that interest can be paid and, if payment is delayed, whether an oversecured creditor can be provided with adequate protection of its right to postpetition interest.

Throughout these proceedings, petitioner has advanced two contentions: First, under Section 506(b) of the Bankruptcy Code, petitioner, as an oversecured creditor, is entitled to postpetition interest. Second, under Section 362(d)(1) of the Bankruptcy Code, petitioner is entitled to adequate protection of that statutory right to interest. The evidence is undisputed that petitioner's postpetition interest is $8,292.90 per month. R1-5, Ex. 27; R1-1-Tr.36.

A. Proceedings In The Bankruptcy Court.

On November 30, 1992, Respondent, Delta Resources, Inc. (Delta), filed a voluntary petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, in the United States Bankruptcy Court for the Northern District of Alabama. Petitioner holds a perfected security interest in respondent's accounts receivable, equipment, general intangibles and other property. App. 22. Invoking the bankruptcy court's jurisdiction under 28 U.S.C. § 157, petitioner sought relief from the automatic stay with the bankruptcy court pursuant to Section 362 of the Bankruptcy Code. App. 2. Petitioner argued, inter alia, that its perfected security interest in respondent's equipment collateral "was not adequately protected." App. 29. Respondent, as a debtor-in-possession, opposed the motion. App. 2, 22.

The bankruptcy court denied the motion and entered its order disposing of petitioner's request for relief. App. 29-32. The court stated that "this dispute is a matter of providing adequate protection for this oversecured creditor's interest until the debtor's Chapter 11 plan can provide a more permanent remedy." App. 29. The bankruptcy court found that petitioner's "secured interest in its collateral will be adequately protected by periodic cash payments." App. 32. The bankruptcy court ordered respondent to pay petitioner $9,972.41 per month, be-

ginning on April 1, 1993. This payment amount equals accruing depreciation only. App. 31-32. The bankruptcy court stated that the postpetition interest issue "should be dealt with at the time of confirmation of the debtor's Chapter 11 plan." *Id.* Petitioner appealed the bankruptcy court's order to the United States District Court for the Northern District of Alabama.

B. Proceedings In The District Court.

The district court reversed the bankruptcy court's decision. App. 21-28. The court found that petitioner was an "oversecured creditor" because "the value of the collateral exceeded the debt." App. 23. The court stated that (i) "[a]s an oversecured creditor, Credit Alliance [ORIX] is entitled to postpetition interest under 11 U.S.C. § 506(b)," (ii) "[a]s this interest accrues it also becomes secured by the security interest held by the creditor in the property," (iii) "the equity cushion is small, only $57,160.64" and (iv) "[t]he payments ordered by the bankruptcy court would offset the future depreciation in the value of the collateral but would not protect Credit Alliance from damage to the security cushion engendered by the accruing interest." App. 24.

Relying on this Court's decision in *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988), the court held that petitioner was entitled to postpetition interest during the stay period as part of adequate protection. App. 25. The court remanded the case to the bankruptcy court with instructions that the court "order monthly adequate protection payments of $18,264.31 (bankruptcy court determined monthly depreciation of $9,972.41 plus $8,292.90 monthly postpetition interest) be paid by Delta Resources, Inc. directly to Credit Alliance retroactive to March 17, 1993, the date of the bankruptcy court's order from the bench

denying relief from stay." App. 28. Respondent then appealed to the court of appeals.

C. Proceedings In The Court of Appeals.

The court of appeals reversed. *ORIX Credit Alliance, Inc. v. Delta Resources, Inc.*, 54 F.3d 722 (11th Cir. 1995). App. 1-18. The court stated that "[t]he question before us is not whether an oversecured creditor whose collateral is worth more than the amount of its debt in a Chapter 11 bankruptcy case may obtain postpetition interest as part of its claim." App. 10. The court correctly stated that "it seems beyond peradventure that a creditor's right to recover postpetition interest on its oversecured claim pursuant to 11 U.S.C. § 506(b) is virtually 'unqualified.'" App. 10 (quoting *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989)). Respondent agreed. *See* App. 11 ("Delta does not dispute that an oversecured creditor is entitled to postpetition interest on its claim"). The court framed the sole issue presented as whether oversecured creditors such as petitioner are "entitled to receive periodic cash payments for accruing postpetition interest as part of adequate protection, pursuant to 11 U.S.C. § 362(d)(1)," during the stay period. App. 10-11.[1]

The court held that "ORIX, as a matter of law, was not entitled to receive periodic payments for accruing

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[1]The court of appeals stated that the bankruptcy court "did not find whether ORIX in fact was an oversecured creditor. Instead, the court merely assumed, as ORIX had asserted, that ORIX was an oversecured creditor." App. 2-3. The court's statement is mistaken. Both the bankruptcy court and the district court found that petitioner was an oversecured creditor. App. 11, 23, 29. The record fully supports those findings. *See* R1-1-Tr.-15, 33, 138-44, 181. In any event, the court of appeals treated petitioner as an oversecured creditor throughout its opinion, and the court's decision applies to *all* oversecured creditors in bankruptcy cases, not just to petitioner. App. 17.

postpetition interest as part of adequate protection for any period of time" during the stay period or prior to "the completion of reorganization or confirmation of the bankruptcy case." App. 16-17. The court reasoned that "11 U.S.C. § 506(b), providing for postpetition interest on oversecured claims, read *in pari materia* with 11 U.S.C. § 362(d)(1), concerning conditioning the automatic stay on adequate protection, and 11 U.S.C. § 502, regarding the allowance of claims, requires that the payment of accrued postpetition interest to an oversecured creditor await the completion of reorganization or confirmation of the bankruptcy case." App. 16. The court, therefore, reversed the district court's order awarding adequate protection payments to the extent that such payments included postpetition interest. App. 18.

REASONS FOR GRANTING THE WRIT

The court of appeals erroneously answered important and complex questions of bankruptcy law that will recur with regularity in business and consumer bankruptcy cases involving an oversecured creditor. By concluding that the Bankruptcy Code requires that payment of postpetition interest to oversecured creditors await the completion of the bankruptcy, with the result that adequate protection cannot include periodic payments of accrued postpetition interest, the court of appeals has fundamentally changed the practical administration of bankruptcy cases and the settled expectations of creditors. These rulings are also inconsistent with the Bankruptcy Code, with this Court's reasoning in *United States Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988), and with the orders of many lower courts. Accordingly, the decision below warrants review by this Court at this time, even though at present there is no direct conflict among the circuits on the question presented.

I. The Question Presented Is Important.

Questions relating to the payment of postpetition interest in bankruptcy are important because bankruptcy cases take so long and because the ultimate outcome of a bankruptcy case and the ultimate distributions to creditors are so unpredictable. Six recent studies report the *median* time between the filing of a bankruptcy petition and the confirmation of a plan of reorganization is from 17 to 32 months. *See* Lynn LoPucki, *The Trouble With Chapter 11*, 1993 Wis. L. Rev. 729, 759. A statistical analysis by the Administrative Office of the United States Courts estimates that only 17% of Chapter 11 cases ever result in a confirmed plan of any kind.[2] Therefore, the question presented by the court of appeals' decision will arise with the degree of regularity necessary to justify review by this Court. Indeed, this Court has recognized the importance of postpetition interest by granting certiorari and deciding three cases that involved questions of which categories of creditors have a right to postpetition interest. *Timbers, supra; Ron Pair, supra; Rake v. Wade,* 113 S.Ct. 2107 (1993).

Unquestionably, oversecured creditors have a right to postpetition interest. The Bankruptcy Code expressly provides for postpetition interest for oversecured creditors in Section 506(b).

The existence of an "equity cushion" is not only the basis for the right to postpetition interest but also the most common source of adequate protection of the secured creditor's interest in property. An oversecured creditor's interest in a debtor's property is measured by the amount of that creditor's claim secured by the

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[2]The relevant pages of this study are reproduced in the appendix at pages 34-39. A copy of the study has been served on respondent and ten copies of the study have been lodged with the Clerk for the convenience of the Court.

debtor's property. If, for example, D owes C $80,000 and that debt is secured by collateral which is worth $100,000, C's interest in the property is $80,000 and there is an equity cushion of $20,000 to serve as "adequate protection" that C's interest in property will not be diminished or destroyed because of the delays of bankruptcy.

If, a month later, $500 of interest has accrued on C's oversecured claim, C's interest in property increases to $80,500 and the adequate protection for that enhanced "interest in property" decreases to $19,500. As an oversecured creditor's "interest in property" increases with the accruing of interest, the "adequate protection" for that "interest in property" decreases. If the court of appeals' decision is permitted to stand, the sad reality will be that, given the length of time until plan confirmation and the low percentage of Chapter 11 cases in which a plan is confirmed, what an oversecured creditor will usually get is no interest payments and an asset returned with a value diminished well in excess of the debtor's depreciation payments. The court of appeals' holding that "an oversecured creditor's interest in property which must be adequately protected encompasses the decline in the value of the collateral only" puts the risk of the duration of the respondent's bankruptcy case on the petitioner. App. 17.

Other secured creditors are also now confronting new, unexpected risks. The court of appeals' decision is not limited to proceedings under Section 362(d) of the Bankruptcy Code, not limited to Chapter 11 bankruptcy cases, and not limited to creditors secured by commercial equipment.

The decision below already has resulted in the change of an adequate protection order under Section 363 of the Bankruptcy Code in a Chapter 7 case involving a creditor secured by accounts receivable. *See In the Matter of M4 Enter., Inc.,* 183 B.R. 981 (Bankr. N.D. Ga. 1995).

Two days before the Eleventh Circuit issued its opinion in this case, a bankruptcy court in Atlanta, Georgia held a final hearing on a Chapter 7 trustee's use of the proceeds from encumbered accounts receivable. Under Section 363 of the Bankruptcy Code, a Chapter 7 trustee (or Chapter 11 trustee or debtor in possession) can use such cash collateral only if there is "adequate protection" of the creditor's interest in the property. Typically, the trustee and the secured creditor reach an agreement as to what shall serve as "adequate protection," and that agreement is approved by the court pursuant to Section 363(c). *See* 3 *Collier Bankruptcy Practice Guide* para. 41.04 (1995). In *M4 Enterprises,* the adequate protection agreement provided for the payment of postpetition interest as it accrued on the creditor's oversecured claim, and this agreement was orally approved by the bankruptcy court at the hearing. 183 B.R. at 981, 984, n.3. The Eleventh Circuit issued its opinion in this case before the bankruptcy court signed the consent order. Looking to the Eleventh Circuit's conclusion that payment of postpetition interest must await the completion of the bankruptcy case, the bankruptcy court concluded that *"Delta Resources* prevents the Court from authorizing an agreement to do so [pay postpetition interest as part of adequate protection]." 183 B.R. at 986.

The decision below may also result in a change of the treatment of home mortgages in an individual debtor's Chapter 11 or Chapter 13 bankruptcy case, by delaying postpetition monthly mortgage payments until the Chapter 11 or Chapter 13 plan is confirmed or the case is otherwise concluded. Consider the effect of the decision below on the following example: D, a Chapter 11 or Chapter 13 individual debtor, owns a home subject to C's mortgage. The home has a value of $90,000; the amount owed on the mortgage is $80,000; and the monthly payment is $700, most of which is interest. Until now, an

individual debtor typically continued making her monthly home mortgage payments after filing a Chapter 11 or Chapter 13 bankruptcy petition.

Under the court of appeals' decision, however, D could stop making monthly home mortgage payments as soon as she filed her bankruptcy petition because, according to the court below, C's interest in the property which must be adequately protected is limited to the decline in the value of the collateral. Moreover, the bankruptcy court that decided the *M4 Enterprises* case would likely hold that D is barred by the Eleventh Circuit's decision in this case from making monthly home mortgage payments until the plan is confirmed or the case otherwise ends. This is true because the Eleventh Circuit reads the Bankruptcy Code as "requir[ing] that the payment of postpetition interest to an oversecured creditor await the completion of the reorganization." App. 16. The application of the court of appeals' decision in this case will affect the availability and cost of home mortgages and other real estate financings as well as the cost and availability of equipment and receivables financing.

II. The Decision Of The Court Of Appeals Is Erroneous.

The court of appeals' holding might have been consistent with the Bankruptcy Act of 1898, which did not expressly provide for either a right to postpetition interest on oversecured claims or a right to adequate protection payments. However, that ruling is inconsistent with the present Bankruptcy Code, which does provide for a right both to postpetition interest and to adequate protection of an interest in property. By recognizing a right to postpetition interest based on an equity cushion and a right to adequate protection of a secured creditor's interest in property, the Bankruptcy Code created complex new questions relating to the secured party's right to the

debtor's equity in collateral, such as whether a debtor can dissipate collateral needed for accrued postpetition interest, and whether a debtor can dissipate collateral needed for anticipated postpetition interest. *See generally* Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 181-92 (1986); David Carlson, *Postpetition Interest Under the Bankruptcy Code*, 43 U. of Miami L. Rev. 577, 636-52 (1989).

The court of appeals' consideration of the competing rights and interests of the debtor and an oversecured creditor created by the Bankruptcy Code is incomplete and unworkable. For example, if, as the court of appeals held, adequate protection "encompasses the decline in the value of the collateral only," a debtor could encumber or otherwise use the equity cushion that gives rise to the statutory right to postpetition interest to eliminate that right. Assume again that D owes C $80,000 and that debt is secured by collateral with a value of $100,000. Under Section 506(b) of the Bankruptcy Code, C has a right to postpetition interest based on the equity cushion. Under the decision below, however, D can eliminate any possible recovery of postpetition interest by obtaining a loan secured by the $20,000 cushion since no part of that $20,000 can be paid to C until the completion of the case and D is not required to provide adequate protection of the payment of accrued postpetition interest during the case.

The court of appeals, in denying relief to petitioner, relied heavily on this Court's decision in *Timbers*. The court of appeals stated that "[t]he *ratio decidendi* enunciated by the Supreme Court in *Timbers* that an undersecured creditor is not entitled to postpetition interest on its collateral *during the stay* to assure adequate protection under 11 U.S.C. § 362(d)(1) applies equally well to an oversecured creditor." App. 16 (emphasis in original). That conclusion is mistaken.

In *Timbers,* the Court held that a claim of an undersecured creditor does not include the right to postpetition interest and, therefore, adequate protection of an undersecured creditor cannot include protection of postpetition interest payments. 484 U.S. at 372-73. This Court's holding in *Timbers* that adequate protection cannot include payments for a right that an undersecured creditor *does not* have in no way "applies equally" to the Eleventh Circuit's holding that adequate protection cannot include payments for a right that an oversecured creditor *does* have. Indeed, if the Court's reasoning in *Timbers* was that no creditor, undersecured or oversecured, was entitled to adequate protection payments for postpetition interest, then the Court's lengthy discussion of the Bankruptcy Code's different treatment of oversecured and undersecured creditors was not even dicta, but, instead merely meaningless surplusage. Neither the holding nor the reasoning in *Timbers* supports the Eleventh Circuit's conclusion that payments of interest that has accrued under Section 506(b) of the Bankruptcy Code must await the completion of the case.

Further, in *New York Life Ins. Co. v. Revco D.S., Inc.,* 901 F.3d 1359 (6th Cir. 1990), the Sixth Circuit rejected the argument that *Timbers* prohibits interim adequate protection payments of postpetition interest to an oversecured creditor. The *Revco* case involved a postpetition borrowing under Section 364(d) of the Bankruptcy Code. Section 364(d) empowers a bankruptcy court to approve the debtor's granting its postpetition lender a lien on already encumbered property superior to the existing lien of a pre-petition lender if there is "adequate protection of the interest of the holder of the [pre-petition] lien." 11 U.S.C. § 364(d). In *Revco,* the bankruptcy court's order directed the debtor to make monthly adequate protection payments of accrued postpetition interest to oversecured pre-petition creditors. On appeal, the Sixth

Circuit stated: "NYLIC argues that *Timbers* supports its position that interim payments are illegal under the Bankruptcy Code. In *Timbers*, however, the Supreme Court held that *undersecured* creditors are not entitled to compensation for 'lost opportunity cost' during a Chapter 11 case. Other than the holding that the value of the collateral is the interest that should be adequately protected, *Timbers* does not appear to apply to this case." 901 F.2d at 1365 (emphasis in original).

The Eleventh Circuit's decision is not only inconsistent with the Sixth Circuit's decision in *Revco* but also with the settled practice in the bankruptcy courts. Payment of accrued postpetition interest to oversecured creditors prior to the confirmation of a plan is a common bankruptcy practice. *See, e.g., Revco, supra; M4 Enter., supra; In re Noyes*, 62 B.R. 115, 117 (Bankr. D. Neb. 1985); *In re Mr. D Realty Co.*, 27 B.R. 359 (Bankr. S.D. Ohio 1983). While relatively few reported cases address the payment of accrued postpetition interest to secured creditors as adequate protection, bankruptcy courts address these questions daily and, in unreported orders, regularly grant such adequate protection payments.[3]

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[3]*See* Corinne Ball, *An Overview of Chapter 11*, in *Practising Law Institute, Investing in the Troubled Company*, 556 PLI/Comm 71 (1990) ("over-secured lenders can require the periodic payment of cash equal to the contractual interest accruing on the lender's pre-petition claim as a condition to the extension of post-petition credit. The authorization of such an agreement can be obtained only by receiving authorization from the bankruptcy court for the debtor to use cash collateral and upon a bankruptcy court order granting the over-secured lender such payments as adequate protection for its collateral. *See* 11 U.S.C. §§ 361 and 363. This type of post-petition financing agreement was authorized by the court in *In re Federated Dept. Stores, Inc.*, pursuant to an unpublished order"); *Cf.* 3 *Collier on Bankruptcy* para. 506.5, at 506-44 (15th ed. 1995) (adequate protection can be the basis for payments of postpetition interest).

In sum, the conclusions and holdings of the court of appeals are not workable and are not consistent with this Court's ruling and reasoning in *Timbers*, with Bankruptcy Code provisions and policies, or with bankruptcy court decisions and practices. Unless the Court addresses these issues now, the decision below will result in costly and needless litigation and unwarranted changes in the administration of business and consumer bankruptcy cases. Therefore, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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